88-722

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

CLAYTON STAPLETON

Petitioner,

v.

STATE OF OHIO

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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QUESTIONS PRESENTED

1. Whether defendant is denied his substantive due process right to a fair trial when the trial court refuses to give the cautionary jury instruction on accomplice testimony.

2. Whether the omission of a cautionary jury instruction on accomplice testimony requires the case to be reversed on appeal to protect a defendant's substantive due process right to a fair trial.

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U.S. Const. amend. XIV 2

Other Cite:

17 A.L.R. Fed. 249 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. _____

CLAYTON STAPLETON

Petitioner,

vs.

STATE OF OHIO

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The Petitioner, Clayton Stapleton, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered in this proceeding on August 31, 1988.

OPINIONS BELOW

The opinion of the state court of appeals appears in the Appendix hereto and is not reported. No opinion was rendered by the Ohio Supreme Court nor by the state trial court.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on August 31, 1988, and this petition for certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. XIV, Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On August 8, 1986 Petitioner was arrested in Harrison Township, Montgomery County, Ohio by the Montgomery County Sheriff's Department.

On August 9, 1986 four charges were filed in the Vandalia Municipal Court. A preliminary hearing was waived and the matter was bound over to the Montgomery County Grand Jury for consideration.

On August 28, 1986 the Grand Jury returned a four (4) count indictment charging Petitioner with two (2) counts of selling cocaine in an amount exceeding three (3) times bulk amount, in violation of Ohio Revised Code § 2925.03(A)(7); one (1) count of possession of cocaine in an amount exceeding bulk in violation of Revised Code § 2925.03(A)(4); and permitting a vehicle to be used in the commission of a felony, to wit, Aggravated Trafficking in violation of Ohio Revised Code § 2925.13(A).

On October 1, 1986 a hearing on Petitioner's motion to suppress the search and seizure was heard by the trial court and was overruled.

On March 9, 1987 the jury trial commenced and Petitioner filed written instructions requesting the cautionary instruc-

tion on accomplice testimony. Over Petitioner's objections, the trial judge refused to instruct the jury on accomplice testimony. (Transcript of Proceedings in the Common Pleas Court of Montgomery County, Ohio [hereinafter "Tr."] at 514). On March 13, 1987, the jury returned guilty verdicts against Petitioner on all the charges.

On April 15, 1987 Petitioner was sentenced to the Chillicothe Correctional Institute for a term not less than four (4) years nor more than twenty-five (25) years with five (5) years actual incarceration on each count of Aggravated Trafficking to be served concurrent with each other; a term of eighteen (18) months actual incarceration on Aggravated Trafficking to be served consecutive with the above sentences; a term of six (6) months on the Permitting Drug Abuse charge to be served concurrent with the above. The Court also imposed a Fifteen Thousand Dollar ($15,000.00) fine.

Petitioner appealed on the ground, *inter alia*, that the failure to instruct the jury on accomplice testimony violated Petitioner's right to a fair trial and his substantive due process rights under the Fourteenth Amendment to the United States Constitution. His conviction was affirmed by the state appellate court. *State* v. *Stapleton*, Case No. CA-10454 (Montgomery County, Ohio Ct. App. April 21, 1988). The Supreme Court of Ohio overruled his motion for leave to appeal. *State* v. *Stapleton* Case No. 88-1044 (Ohio Sup. Ct., August 31, 1988).

Further, on April 27, 1988, Petitioner filed a Motion to Certify to the Ohio Supreme Court. Respondent filed a Memorandum Contra on May 9, 1988, and the Second District Court of Appeals overruled Petitioner's Motion to Certify to the Supreme Court of Ohio.

STATEMENT OF FACTS

Clayton Stapleton is a forty-two year old, self-employed cement contractor, former owner of an engine starter repair company and former owner of a tavern in the City of Dayton. He has no prior criminal record.

In the early part of July 1986, Kitty Bailey started residing with Clayton at his home at 455 Blue Ridge Drive, Dayton, Ohio. Two other people were also living in the house at this time.

In late July and early August of 1986, Ms. Bailey was working as a bar maid at the Cabaret Lounge where she met Detectives Munson, Hoover and Ware of the Montgomery County Sheriff's Department. They were posing as prospective drug buyers.

As a result of the detectives' conversations with Ms. Bailey, she sold to them, on four different occasions, various amounts of cocaine. Two dates of these sales, August 5, 1986 and August 8, 1986, are the subject matter of the four count indictment herein. The indictment named the Petitioner and Ms. Bailey as co-defendants on these two counts of Aggravated Trafficking.

On August 8, 1986 after Ms. Bailey was placed under arrest and transported to the Montgomery County Jail, she gave to Detective Munson both a written confession and a taped confession in which she implicated Petitioner as the source of the drugs that she sold to the detectives on August 5, 1986 and August 8, 1986. These statements were given by Ms. Bailey in exchange for the promise by the detectives that they "would get her the best and lightest sentence" (Tr. p. 198), and that she would be released from jail.

On August 9, 1986 Ms. Bailey was given a detective's release from jail (Tr. pp. 197, 198).

On August 11, 1986, two days after her release, Ms. Bailey wrote a letter (Tr. pp. 199, 203, 204) which exculpated Petitioner from the crimes herein.

On February 3, 1987 Ms. Bailey entered a plea of guilty to two reduced charges which carried a maximum sentence of eighteen (18) months incarceration on each count, in exchange for her testifying against Petitioner.

Ms. Kitty Bailey, the accomplice, testified at trial, but the trial court refused to give the cautionary instruction for accomplice testimony. As a result, Petitioner was found guilty as charged.

REASONS FOR GRANTING THE WRIT

THE STATE COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This Court has not determined, through its decisions, 1) whether and under what circumstances a cautionary instruction referring specifically to accomplice testimony is required and 2) whether and under what circumstances the omission of such an instruction is prejudicial. Further, this Court has not addressed whether said omission deprives a defendant his right to a fair trial in violation of the due process clause of the Fifth and Fourteenth Amendments. As a direct result of this Court not giving the lower courts guidelines as to when and under what circumstances the cautionary instruction should be given, there has been a total lack of consistent rulings between the lower courts.

In *Cool* v. *United States*, 409 U.S. 100 34 L. Ed. 2d 335, 93 S. Ct. 354 (1972), this Court stated "Accomplice instructions have long been in use and have been repeatedly approved." *See*, e.g. *Holmgren* v. *United States*, 217 U.S. 509, 523-524, 54 L. Ed. 861, 30 S. Ct. 588 (1910). However, the lower courts are in complete conflict with each other on how to interpret this holding by the United States Supreme Court. Each court has its own view as to if and when a person's substantive due process rights are violated by the failure of the court to give this cautionary instruction.

An analysis of the lower federal and state court decisions clearly demonstrates that there is no uniformity in this area of the law. Consequently, some U.S. citizens are receiving their substantive due process rights to a fair trial while many others in the same situation are being denied this important right. The lower courts have decided these issues based on some or all of the following criteria: 1) was a cautionary instruction requested, 2) how strong was the evidence against the defendant, 3) was the accomplice testimony corroborated, 4) were

other instructions concerning the witnesses' credibility given. (See 17 A.L.R. Fed. 249) However, the lower court's examination of these criteria still have not lead to consistent results.

Some of the lower courts hold that when a cautionary instruction is not requested, then failing to give a cautionary instruction as to the testimony of an accomplice is not plain error requiring a reversal of the conviction. *McMillen* v. *United States*, 1st Cir. Mass. 386, F. 2d 29, cert. den. 390 U.S. 1031, 29 L. Ed. 2d 288, 88 S. Ct. 1424 (1967). While many other lower courts reached the opposite result under similar circumstances. They have held it is plain error to not give a cautionary instruction as to accomplice testimony even when the cautionary instruction is not requested. *Tillery* v. *United States*, 5th Cir. Ga. 411, F. 2d 644 (1969). See also *McMillen* v. *United States*, *supra*. (Court held it was plain error for the one defendant but not for the other).

Many Courts look at the evidence against the Defendant and decide whether or not it was erroneous to give a cautionary instruction based on the strength or weakness of the evidence against Defendant. *Williamson* v. *United States*, 5th Cir. Fla. 332 F. 2d 123 (1964) (Case was close one against Defendant — omission of cautionary instruction was plain error). *Tillery* v. *United States*, *Supra*, (evidence weak against the Defendant — omission of cautionary instruction was plain error); *United States* v. *Becker*, 2d Cir. N.Y. 62 F. 2d 1007 (1933) (evidence strong — no cautionary necessary); *United States* v. *Smith*, 4th Cir. N.C. 459 F. 2d 12 (1972) (accomplice testimony not unreliable — no cautionary instruction necessary).

Another factor the lower courts examine is whether or not the accomplice testimony is corroborated by other evidence. When the accomplice testimony is corroborated by other evidence many of the lower courts hold that the failure to give a cautionary instruction is not grounds for reversal. *United States* v. *Nabrit*, 5th Cir. Ga. 554 F. 2d 247 (1977),

McMillen v. *United States*, *Supra*. However, when the accomplice testimony is uncorroborated then the courts have ruled differently. Many of the Courts have held that it is plain error so as to warrant reversal. *United States* v. *Masino*, 2d Cir. N.Y. 275 F. 2d 129 (1960); *McMillen* v. *United States*, *Supra*. While other courts have held that uncorroborated testimony does not require a cautionary instruction and it is not plain error to fail to give the instruction. *DeCarlo* v. *United States*, 9th Cir. Cal. 422 F. 2d 237 (1970).

One other factor the lower courts have examined is whether other instructions concerning the witnesses' credibility were given. In *McMillen* v. *United States*, *supra*, the court held that the other instructions were insufficient and the cautionary instruction on accomplice testimony must be given. In *United States* v. *Beasley* 5th Cir. Ala. 519 F. 2d 233 (1975) reh. den. 522 F. 2d 1280 and vacated on other grounds. 425 U.S. 956, 48 L. Ed. 2d 201, 96 S. Ct. 1736, the court held that "defendant's substantial rights were not prejudiced by its omission" when the jury had been thoroughly informed of the accomplices' background, relationship to the government and motive for testifying as a government witness.

By examining these cases, it is evident that there is no clear guidelines from the United States Supreme Court to the lower federal courts as to when the cautionary instruction is required, and when the denial of said instruction requires reversal of the lower court.

Our citizens in the State of Ohio also suffer substantive due process violations involving a lack of fair trial depending on the federal or state court hearing the case. Some of the State courts have stated that the cautionary instruction is required and it is prejudicial error for the courts not to give said instruction. *State* v. *Ferguson*, 30 Ohio App. 3d 171, 30 Ohio B.R. 312, 507 N.E. 2d 388 (1986). While in the case *sub judice*, the court has refused to give the cautionary instruction and the Court of Appeals has affirmed that decision. The Federal Courts in the Sixth circuit also refuse to give the cau-

tionary instruction and also hold that the omission of the instruction is not grounds for reversal. *United States* v. *Finazzo*, 6th Cir. 288 F. 2d 175 (1961).

The lower courts had outlined the purpose of the accomplice instruction, that is,

> "to assure that the jury realizes that an admitted accomplice's testimony may be affected by the hope of a favor or conversely by the fear of reprisal from the government and considers this factor in weighing such person's testimony." *United States* v. *Beasley*, *supra*, at 243.

Further these lower courts have tried to determine which factors are crucial in determining whether or not a cautionary instruction is required and if it is prejudical error to not give said instruction. But, as can be seen by the great number of disparate results from the lower courts, there is not one scintilla of evidence that the courts will reach any consensus as to when a defendant's right to a fair trial is violated by the omission of the cautionary instruction on accomplice testimony.

Further, an indepth review of the decision of the Ohio Court of Appeals, Second Appellate District, in the case *sub judice* reveals that said court did not follow the U.S. Supreme Court's finding that "accomplice instructions have long been in use and have been repeatedly approved." *Cool* v. *United States*, *supra*. Rather, the Ohio Court of Appeals held that since there was not a statute mandating the cautionary instruction in effect at the time of the offense, the trial court did not have to give a cautionary instruction. *State* v. *Clayton Stapleton*, CA-10454 at page 9, (See Appendix 'B'). This Ohio Court of Appeals did not consider *All* the factors which would usually require a cautionary instruction: the evidence was weak against the Defendant, the accomplice testimony was mostly uncorroborated, and Defendant repeatedly requested the cautionary instruction. The Ohio Court of Appeals has decided that no cautionary instruction is necessary regardless

of how much the circumstances warrant the instruction. Regardless of how much an individual's substantive due process rights to a fair trial are violated, the Ohio Court of Appeals will never feel compelled to reverse a case based on the omission of the cautionary instruction. This type of ruling by the lower courts is precisely why the United States Supreme Court must decide these issues. These lower court rulings are infringing on all of our citizens right to substantive due process and the right to a fair trial.

Can a defendant receive his right to a fair trial when the trial court refused to give a cautionary instruction on accomplice testimony?

Does the omission of the cautionary instruction on accomplice testimony warrant a reversal of the trial court's conviction? Hundreds of the lower court's rulings on these questions are in conflict with each other. As a result, many lower courts are violating defendants' substantive due process rights to a fair trial.

The lower courts need this Court's guidance and definitive answers to these difficult issues. Without this Court's ruling on these issues, the lower court will continually widen the gap between what is considered a fair trial in one state or district compared to that of the other states and districts. The other result of this Court not deciding these issues is that defendants' substantive due process rights throughout the country will vary so much that no semblance of uniformity and equality can be achieved. The time is ripe for this Court to decide these important questions of federal law.

CONCLUSION

For these reasons, this petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED

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APPENDIX 'A'

THE SUPREME COURT OF OHIO
COLUMBUS

1988 TERM
To wit: August 31, 1988

Case No. 88-1044

STATE OF OHIO,

Appellee,

v.

CLAYTON STAPLETON,

Appellant.

ENTRY

Upon consideration of the motion for leave to appeal from the Court of Appeals for Montgomery County, it is ordered by the Court that said motion is overruled.

COSTS:
Motion Fee, $20.00, paid by John H. Rion & Associates, Inc.

/s/ THOMAS J. MOYER
Chief Justice

[DULY CERTIFIED]

APPENDIX 'B'

IN THE COURT OF APPEALS OF
MONTGOMERY COUNTY, OHIO

CASE NO. CA 10454
(C.P. No. 86-CR-1674)

STATE OF OHIO,
Plaintiff-Appellee,

vs.

CLAYTON STAPLETON,
Defendant-Appellant.

FINAL ENTRY
(Filed April 28, 1988)

Pursuant to the opinion of this court rendered on the 21st day of April, 1988, the judgment is affirmed.

/s/ JOSEPH D. KERNS
Presiding Judge

/s/ WILLIAM H. WOLFF, JR.
Judge

/s/ MIKE FAIN
Judge

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APPENDIX 'C'

IN THE COURT OF APPEALS OF
MONTGOMERY COUNTY, OHIO

CASE NO. CA 10454
(C.P. No. 86-CR-1674)

STATE OF OHIO,
Plaintiff-Appellee,
vs.
CLAYTON STAPLETON,
Defendant-Appellant.

OPINION
Rendered on the 21st day of April, 1988.

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By: CARLEY J. INGRAM, Assistant Prosecuting Attorney, Appellate Division, Montgomery County Administration Building, P.O. Box 972, 451 West Third Street, Dayton, Ohio 45422
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Attorney for Defendant-Appellant

WOLFF, J.

On August 28, 1986, the Grand Jury returned a 4 count indictment charging Clayton Stapleton with 2 counts of selling cocaine in an amount exceeding 3 times bulk amount; one count of possession of cocaine in an amount exceeding the bulk amount; and one count of permitting a vehicle to be

used in the commission of a felony, to wit: Aggravated Trafficking.

On March 9, 1987, the jury trial commenced, ending on March 13, 1987. The jury returned guilty verdicts on all counts. On April 15, 1987, Stapleton was sentenced to two concurrent terms of 4 to 25 years, each term including a term of actual incarceration of 5 years. Stapleton was also sentenced to a term of actual incarceration of 18 months on the third degree felony trafficking charge, and 6 months on the permitting drug abuse charge. The 18 month sentence was to be served consecutively to the first degree felony sentences. The 6 month sentence was imposed concurrent to the 18 month sentence. The trial judge also imposed a $15,000 fine.

Stapleton filed a timely notice of appeal, asserting the following assignments of error:

I. The trial court's failure to instruct the jury on accomplice testimony denied appellant his right to a fair trial.

II. The appellant's right to a fair trial was violated by the admission into evidence of hearsay statements.

III. There was insufficient evidence to support the findings herein.

We affirm.

While investigating a complaint of an illegal gambling machine at the Cabaret Lounge in Harrison Township, plainclothes detectives from the Montgomery County Sheriff's Office met Kitty Bailey, a barmaid at the Cabaret Lounge. Bailey indicated that she was able to obtain cocaine for them, and that she had two sources. (Tr. 52, 352.) On July 29, 1986, Bailey agreed to obtain one gram of cocaine for Det. Douglas Hoover. (Tr. 52, 252.) Bailey and Det. Nels Munson went to 634 Carlisle Avenue in Dayton, the residence of one Anthony Marinelli. Bailey entered the residence by herself and purchased the gram for $95.00. (Tr. 53, 54, 162, 354.)

On August 1, 1986, Munson and Hoover asked Bailey if she could get half an ounce of cocaine for them. (Tr. 55, 354.)

Bailey made some phone calls, and subsequently told the detectives that Marinelli would sell them half an ounce for $1,100. (Tr. 55.) Munson, Hoover and Bailey went to Marinelli's house and eventually purchased the half ounce. (Tr. 55-56, 355-56.) Again, however, neither Munson nor Hoover entered the home with Bailey.

The detectives subsequently told Bailey that they wanted to purchase one and a half ounces of cocaine, but that they did not like Marinelli's refusal to admit them into his house. (Tr. 56, 165.) Munson testified that Bailey told him that she did not like it either and that she would prefer going through Clayton Stapleton. (Tr. 57.) Bailey proceeded to call Stapleton from the bar (the Cabaret) (Tr. 57.) Munson then testified that Bailey then told the detectives that Stapleton had an ounce and a half, and would sell it for $2,950. (Tr. 57.) Bailey herself testified that Stapleton told her on the phone he could sell the cocaine for a "better price" than Marinelli could. (Tr. 165.) A short time after this phone call, Stapleton came into the bar. Detective Hoover testified that Bailey told them that Stapleton was just "checking them out." (Tr. 357.) Stapleton did not approach the detectives in the bar, and left after a short time. (Tr. 58.)

The next day, August 5, 1986, the sale of the 1½ ounces occurred at the Coach-N-Four Motel in Dayton. (Tr. 58.) Bailey arrived, and explained that the defendant wanted the sale made in half-ounce increments. Bailey gave the detectives one-half ounce, which they paid for. She then left, and returned a while later with a full ounce of cocaine. (Tr. 59, 62, 360.) Bailey testified that she got the cocaine from Stapleton. (Tr. 169.) (At the time of these events, Bailey was living with Stapleton.)

After the August 5 sale, the detectives told Bailey that they would be interested in buying 4-6 ounces of cocaine. Bailey testified that Stapleton told her that he only had 4 ounces left, but that he would sell it for $1,700 an ounce. (Tr. 172.) Bailey contacted Hoover, and the deal was set up for August 8. (Tr. 173.)

According to Bailey, when she went to Stapleton's home on

the afternoon of August 8, he was fishing in a pond at his home with a woman named Brenda Day. (Tr. 174.) Stapleton asked Bailey if she wanted him to go with her and she told him that she would feel safer if he did. (Tr. 174-75.) Bailey then testified that she and Stapleton got into his truck, at which point Stapleton took the bag of cocaine out of his hat. (Tr. 175.) Bailey then took her wallet out of her purse, put it under the seat of the pick-up, and put the cocaine into the purse. (Tr. 175.) Stapleton then drove her to the Holiday Inn on North Dixie, although he stayed in the truck. (Tr. 173.) (The Holiday Inn is apparently very near the Coach-N-Four Motel, where the drug sales on August 5 and August 8 were actually made.)

Brenda Day testified that on the afternoon of August 8, she was at the defendant's house fishing with him in his pond when he answered a telephone call on his cordless phone. (Tr. 299.) The call was apparently from Dave Thomas, a friend of the defendant. Brenda heard Stapleton ask Thomas if he would accompany Kitty to North Dixie Drive to take care of some business, and offered Thomas $100 to do so. (Tr. 300.) After the call, Stapleton told Brenda that he had to go up on North Dixie with Kitty, and that she (Brenda) should stay there until he returned. (Tr. 301.) After Kitty Bailey arrived, Brenda saw Stapleton open a safe in the garage, take something out of the safe and put it in his hat. Brenda could not identify what was taken out of the safe. Stapleton and Bailey then left in Stapleton's truck. (Tr. 301, 305.)

Detective Joseph Steuer had set up surveillance of Stapleton's residence at about 4:45 p.m. (Tr. 371.) Steuer was able to see Stapleton leave in his truck about 5:30, but was unable to see whether there was a passenger inside. (Tr. 372.)

Detective Orihood, who had set up surveillance at the Holiday Inn, observed Stapleton arrive at about 5:45 p.m. (Tr. 387.) He observed a white female exit the truck and Stapleton park in the lot and get out of the truck. Stapleton did not leave the truck, however, but rather sat on the grass. (Tr. 390, 405.)

Kitty Bailey went from Stapleton's truck to the lounge at

the Holiday Inn, where she met detectives Hoover and Debbie Ware. (Tr. 173.) They soon left, and went over to the Coach-N-Four, where they met Detective Munson. (Tr. 173.) Bailey removed the cocaine from her purse and gave it to Hoover who weighed and tested it. (Tr. 174.) He then paid her the agreed price. (Tr. 174.) Shortly thereafter, the detectives identified themselves and arrested Bailey. (Tr. 67, 364.) (This sale was secretly videotaped by the police; however, the videotape was not shown at trial.)

After Bailey's arrest, Orihood was directed to arrest Stapleton, who was still waiting outside the Holiday Inn. (Tr. 400.) Bailey's wallet was found under the seat of Stapleton's truck. (Tr. 401.) Detective Steuer, who was still watching Stapleton's residence, was directed to execute a previously obtained search warrant. (Tr. 373.) Inside a vase of dried flowers in the dining room, two bags were found containing 27.13 grams of cocaine. (Tr. 33-34, 376.)

Kitty Bailey was indicted along with Stapleton. She was charged with four counts of aggravated trafficking, two of which carried terms of five years actual incarceration, and one which carried a term of three years actual incarceration. Bailey was permitted to plead to reduced charges, in exchange for her testimony against Stapleton. She pled guilty to three counts of aggravated trafficking, two of which carried sentences of actual incarceration of eighteen months. (Ex. A, Tr. 188.)

Additional facts will be discussed as they relate to particular assignments of error.

In his first assignment, Stapleton contends that the court's failure to instruct the jury regarding accomplice testimony denied him a fair trial.

Stapleton's written requests for instructions are nowhere to be found in the record presently before this court. At oral argument, counsel for Stapleton orally moved to supplement the record with a copy of his trial brief, file stamped March 9, 1987, at 9:21 a.m., the morning trial commenced. The requested instructions are in the trial brief. Counsel for Stapleton, who also represented him before the Common

Pleas Court, stated that the original trial brief probably didn't get into the official record because he took it directly to the trial judge rather than leaving it with the clerk for docketing and later transmittal to the trial judge.

We are willing to accept this explanation and supplement the appellate record with Stapleton's trial brief.

At the time the offenses in this case occurred, R.C. 2923.03 (D) stated:

> No person shall be convicted of complicity under this section *solely upon the testimony of an accomplice, unsupported by other evidence.* (Emphasis added.)

State v. *Pearson* (1980), 62 Ohio St. 2d 291 held that R.C. 2923.03(D) could prohibit convictions for principal offenses as well as prohibit convictions for complicity offenses. This statute was repealed and replaced, however, effective September 16, 1986. The present 2923.03(D) states:

> (D) If an alleged accomplice of the defendant testifies against the defendant in a case in which the defendant is charged with complicity in the commission of or an attempt to commit an offense, an attempt to commit an offense, or an offense, the court, when it charges the jury, shall state substantially the following:
>
> "The testimony of an accomplice does not become inadmissible because of his complicity, moral turpitude, or self-interest, but the admitted or claimed complicity of a witness may affect his credibility and make his testimony subject to grave suspicion, and require that it be weighed with great caution.
>
> "It is for you, as jurors, in the light of all the facts presented to you from the witness stand, to evaluate such testimony and to determine its quality and worth or its lack of quality and worth."

In this case, the trial judge indicated that, in his view, the language of the revised statute mandated the above instruc-

tion only when a defendant was charged with complicity. (Tr. 514.) We do not, however, reach the question of whether this interpretation was correct, because we conclude the new statute is inapplicable in this case. Under R.C. 2923.03(D) before its repeal, a defendant could not be convicted on the uncorroborated testimony of an accomplice. Under the statute now in effect, a defendant is only entitled to a cautionary jury instruction. A defendant, therefore, has more evidentiary protection under the old statute. The application of the new statute to this case might well run afoul of constitutional prohibitions against *ex post facto* laws. *See also State* v. *Mullins* (1986), 34 Ohio App. 3d 192. In addition, R.C. 1.58 states in pertinent part:

> *Effect of reenactment, amendment, or repeal.*
>
> (A) The reenactment, amendment, or repeal of a statute does not, except as provided in division (B) of this Section:
>
> (1) Affect the prior operation of the statute or any prior action taken thereunder;
>
> (2) *Affect any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder.* . . . (Emphasis added.)

We therefore conclude that there was no statutory duty under R.C. 2923.03(D), as amended, to give a jury instruction on accomplice testimony. Stapleton also argues that the question of whether Bailey's testimony was corroborated by other evidence is one for the jury. As this court stated in *State of Ohio* v. *John P Nickel* (August 19, 1986), Mont. App. No. CA 9451, unreported, a case under the previous statute, "the narrow direction in R.C. 2923.03(D) relates solely to the prohibition of a conviction, *language peculiarly directed to the court as a matter of law and inappropriate for a jury.*" *Id.*, at 12. (Emphasis added.) The trial court in this case denied Stapleton's motion for acquittal under Crim. R. 29. (Tr. 427.) The court reviewed the evidence that had been introduced up

to that point and correctly concluded that there was sufficient corroborative evidence to deny the motion. (This evidence will be more fully discussed in connection with the third assignment of error.)

We also note that the jury was fully apprised of Bailey's connection to Stapleton. The terms of her plea bargain were fully explored on cross-examination. Defense counsel made it a point to attack Bailey's testimony during closing arguments. The jury was fully aware of Bailey's possible biases in this case.

The first assignment is overruled.

Stapleton's second assignment of error asserts that he was denied a fair trial because of the admission of certain hearsay evidence. Specifically, Stapleton objects to State's Exhibit 7, a taped conversation between Detective Numson and Kitty Bailey. This conversation was held August 8 after Bailey had been arrested and had given her written statement. (The written statement was read into evidence during direct examination.)

Stapleton's contention is that the statements contained on the tape constituted highly prejudicial hearsay. On the tape, Munson questioned Bailey about Stapleton's frequent trips to Florida, among other things. Stapleton contents that Munson's questions impermissibly inferred that Stapleton went to Florida in order to obtain drugs.

Tape was played during redirect examination. The defense had put Bailey's credibility into question during cross-examination by way of Defense Exhibit A, a letter Bailey wrote, but did not mail, sometime after her release on August 9.

The bizarre history of this letter is as follows. Bailey testified that she wrote the letter on or about August 11. (Tr. 199.) This letter basically exonerates Stapleton by saying that she gave her statement implicating Stapleton to the police only to get out of jail. (Tr. 202; Exhibit A.) The letter further states that all of the cocaine Bailey sold to the undercover police came from Anthony Marinelli, and that Stapleton had

no knowledge of her cocaine transactions. (Tr. 203; Exhibit A.)

Bailey testified that she wrote the letter because of her animosity towards Marinelli, due to an alleged beating. (Tr. 205-206.) Kitty also said the letter was untrue. (Tr. 222.)

Bailey apparently kept this letter in her wallet until sometime in October. At that time, she and her ex-husband Jeff Wolfe went to Belmont Park in Dayton, where Bailey showed the letter to Wolfe. (Tr. 285.) Bailey testified she "felt foolish" in thinking that she could "put everything off on Anthony for what he had done to me and what he has been doing to my sister." (Tr. 209.) Bailey then "tore the letter up into small pieces with the intent of no one ever seeing it because it was not true, and I threw it in the trash." (Tr. 210.)

It is at this point that the chain of custody of the letter becomes, to quote Lewis Carroll's Alice, "curiouser and curiouser." A park maintenance man by the name of Donny Terry happened upon the scraps of paper while picking up trash in the park. (Tr. 437.) Terry testified that when he picked up the papers he saw the words "detective" and "cocaine". (Tr. 439.) Thinking that the note sounded "interesting", he stuck the pieces in his pocket. (Tr. 439.) He took the letter home and taped it together so he could read it. (Tr. 438.) The next day, the letter was read by Terry's friend, Dan Coleman, who also knew Clayton Stapleton. Coleman took the letter to another friend, Bob Williams, who also knew Stapleton. (Tr. 445-46.) He did this because he did not know where Stapleton lived. (Tr. 446.) Williams testified that he read the letter, and gave it to Stapleton. (Tr. 449.)

It is against the backdrop of this letter that the State sought to admit Exhibit 7, the Munson-Bailey tape made August 8. The trial court permitted the playing of the tape over the defendant's objection. The State argued to the trial court that the tape was being used by way of rebuttal to the attack on Bailey's credibility:

> Mr. Adkinson: . . . Her answers are what's the key. In any event, as I said before, her credibility was attacked.

> This is a prior consistent statement by her. It is just that we have to have the questions to know what the answers will be. (Tr. 237.)

After playing the tape, the court instructed the jury as follows:

> The Court wishes to caution the jury, we want to make sure that you ignore any insinuations, any suggestions there may have been in a question or a comment by the officer that didn't lead to an answer. Your interest should be only in the answers of Kitty Bailey. I noticed there was some matters of insinuation that are improper and those should be ignored, that is, the insinuations in questions or comments of the officer.
>
> (Tr. 260)

The Court previously had overruled one of defense counsel's objections to the tape by stating that the tape appeared to be "statements of an agent or co-defendant and is proper to be presented." This ruling apparently relies upon Evid. R. 801(D)(2)(e), which states that a prior statement of a witness is not hearsay if it is a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

We agree with Stapleton that Evid. R. 801(D)(2)(e) is not applicable here because Bailey's statements were made after her arrest, and were no longer made in furtherance of the conspiracy. We believe, however, that Evid. R. 801(D)(1)(b) authorized the admission of the tape. This section states that a statement is not hearsay if the declarant testifies at trial and the statement is consistent with his testimony and is offered to *rebut an express or implied charge of recent fabrication or improper influence or motive.* The letter states that she got the cocaine from Anthony Marinelli, and that she implicated Stapleton only to get out of jail. We conclude that the tape was properly admitted on the facts of this case to rebut the attack on Bailey's credibility.

In addition, the statements made by Bailey weakened any improper inferences raised by Munson's questions. For example:

> Munson: Well, I'm sure when you are around his house, you see all these things, parts of Corvettes, parts of cars, or whatever, trucks and you never ask him what the hell is part of a Corvette doing in your backyard or on the back of a pickup truck in your driveway or something?
>
> Bailey: The only dealings I have seen him do have been legitimate, working, buying a truck, working on it, and selling it and that's it.
>
> Munson: Of course, now you know, I'm sure, you are twenty-four years old, you've been around a little bit, you know that a man can't maintain that kind of place fixing trucks up; right?
>
> Bailey: The main thing that I attribute to is the properties in Florida that he owns and makes rent off of every month and investments through — I mean he gets it in the mail all the time, stock exchange investments and that's through a legitimate record. As far as anything outside of that, I've seen him do nothing.

(Tr. 253 [transcript of tape].)

The second assignment is overruled.

Stapleton's final assignment is that there was insufficient evidence to support the convictions.

As to the possession charge, the evidence was that cocaine was found in a flower vase during the search of Stapleton's home which was executed on August 8. The evidence was that the vase was found in the dining room, and that while three other people lived with Stapleton, he owned the house and furnishings in the common areas. (Tr. 193, 327, 339.) All three of the boarders denied any knowledge of the cocaine. The question is one of credibility of the evidence, which is for the trier of facts. *State* v. *DeHass* (1967), 10 Ohio St. 230.

We agree with the trial court's assessment that the evidence sufficiently corroborated Bailey's testimony to withstand Stapleton's Crim. R. 29 motion for acquittal at the end of the State's case. In order to satisfy the corroboration requirement of former R.C. 2923.03(D), the independent evidence supporting the accomplice's testimony must tend to connect the accused with the alleged crime in such a way as to identify the accused as a guilty actor. *State* v. *Pearson* (1980), 62 Ohio St. 2d 291.

Detective Munson testified concerning the details of the investigation. He testified that on August 4 he and the other detectives met Kitty Bailey at the Country Music Cabaret. (Tr. 56.) At that time, they told Bailey that they were interested in buying an ounce and a half of cocaine, but that they did not like the way the "deal went over on Carlisle Avenue" (Marinelli's house). (Tr. 56.) Kitty did not like it either. (Tr. 56.) Munson then stated the following:

> MUNSON: . . . We told her that we wanted an ounce and a half, but we didn't like the way the deal went down for the half ounce and she told us she didn't like it either and that she would much prefer going to Clayton Stapleton.
>
> Q. And what happened as a result of that conversation?
>
> A. She — we were at a table and she said she would call Clayton and see if he was holding any and she proceeded to get up from the table and use the pay phone. A short time later, she returned to the table and told us that Clayton had an ounce and a half, that he wanted — and it would cost us twenty-nine fifty, $2,950, $2,700 of that going to Clayton and $250 for herself. We agreed to that, that the price was good and at that time, we made arrangements with her to contact her the next day in order to finalize the transaction as to the location and time and so forth. A short time later, Clayton Stapleton entered the bar, the Country Music Cabaret. Kitty had

> already stated that if Clayton were around, that it had to be strictly business, so when she saw him come in, she got up and left. She went over to another part of the bar and she had also mentioned that Clayton is a very cautious person, he is a very careful person . . . .

(Tr. 57.)

Detective Hoover also testified concerning the meeting with Bailey on August 4. His testimony is similar to Munson's, i.e., that Bailey called Stapleton from the bar concerning the ounce and a half, and that soon after this call was made, Stapleton entered the bar. (Tr. 356-57.) Hoover had also testified that when the detectives had first met Bailey, she had told them that she had two sources of cocaine, one source being the man she lived with. (Tr. 352.) Hoover also stated that Bailey had previously told him that she lived with Clayton. (Tr. 352.) Hoover then said that he "used to know a man by the name of Clayton that owned the Torsian [sic] Bar". (Tr. 352.) Bailey reportedly told him that it was the same man. (Tr. 352.) Hoover testified about the August 4 meeting as follows:

> A. . . . She stated that Marinelli was a hassle. She had made arrangements with him, told her man about it, and at that time she said I told Clayton about it, the hassle we went through with Tony and he can give you a better price, a better price and a lot less hassle. At that time, I requested to get a price on an ounce and a half. She came back with a price for $2,700 for an ounce and a half, plus $250 for herself; total twenty-nine fifty. That arrangement was made on August 4th in the Cararet Lounge in the late evening hours. It was done over a phone conversation. She went to the pay phone there. Munson and myself and Ware were with her. As soon as those arrangements were made, Mr. Stapleton and a female, I'm not sure of who it was, walked in the Cabaret and she said don't worry about it, Clayton is just checking who he is doing business with. He stayed

> approximately an hour and a half and he and the female he was with departed the Cabaret and Ware and myself departed the Cabaret.

(Tr. 357.)

The independent evidence concerning the August 4 meeting does tend to corroborate Bailey's testimony. The detectives were present when Bailey claims to have called Stapleton to set up the sale of 1½ ounces of cocaine, a sale which in fact took place the next day. Shortly after this phone call was made, Stapleton, who Bailey said was a very careful person, entered the bar allegedly to check out who he was dealing with. While Stapleton's appearance may have been coincidental, the jury could have reasonably inferred otherwise.

The evidence presented by the witness Brenda Day (who had only recently met the defendant) supported Bailey's testimony regarding the events on August 8. Day testified that while at Stapleton's home, she overheard a phone conversation between the defendant and a mutual friend, Dave Thomas, in which Stapleton asked Thomas if he would take Kitty "up to North Dixie", and that the defendant was willing to give Thomas $100.00 for doing so. (Tr. 300.) Day then testified that when Stapleton got off the phone he told her that he had to go with Kitty himself, and that Brenda should stay at the house "unless someting went wrong." (Tr. 301.) Brenda had never met Kitty Bailey until that day. (Tr. 300.) After Bailey arrived, Brenda saw Stapleton retrieve something from the safe in his garage and put it in his hat, and then leave in his truck with Bailey. (Tr. 301.) This is consistent with Bailey's previous testimony that Stapleton took the cocaine out of his hat when he got into his truck. (Tr 175.)

Subsequent evidence introduced at trial included Detective Steuer's testimony regarding when Stapleton left his home on August 8. (Tr. 372); Detective Orihood's observance of Stapleton's arrival at the Holiday Inn on that day, and that a

female passenger got out of the truck and entered the hotel. (Tr. 397, 398.) Orihood also testified that he recognized Stapleton. (Tr. 399.)

We also conclude that the cocaine found August 8 in the flower vase corroborates Bailey. Stapleton was charged with drug trafficking, first on August 5 and again on August 8. The seizure of 27.13 grams of cocaine supports Bailey's testimony that Stapleton was a drug supplier, particularly in view of the fact that the cocaine was already separated into two bags.

We conclude that there was sufficient evidence to support the convictions. The third assignment is overruled. The judgment will be affirmed.

KERNS, P.J., concurs.

FAIN, J., concurring;

While I would see no constitutional difficulty with giving amended R.C. 2923.03(D) a retroactive application, it is clear that the General Assembly only intended that that amendment should operate prospectively with respect to criminal cases arising on or after its effective date.

Copies mailed to:

Carley J. Ingram
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CASE NO. 88-722

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

CLAYTON STAPLETON,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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QUESTION PRESENTED:

DOES AN ACCUSED HAVE A DUE PROCESS RIGHT TO A CAUTIONARY INSTRUCTION ON THE UNRELIABILITY OF ACCOMPLICE TESTIMONY, WHEN HE IS STATUTORILY ENTITLED NOT TO BE CONVICTED SOLELY ON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE AND THE JURY IS MADE AWARE OF FACTORS AFFECTING THE RELIABILITY OF ACCOMPLICE TESTIMONY IN GENERAL, AND FACTORS AFFECTING THE RELIABILITY OF THE ACCOMPLICE TESTIMONY IN THIS PARTICULAR CASE?

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

STATEMENT OF THE CASE

On August 28, 1986, this Petitioner was indicted for three counts of Aggravated Trafficking in Cocaine and one count of Permitting Drug Abuse. Two of the Aggravated Trafficking charges were first degree felonies and carried mandatory sentences of five years each. The third Aggravated Trafficking charge was a third degree felony with a mandatory sentence of 18 months. Also charged in the same indictment were Kitty Bailey and Anthony Marinelli. Petitioner pleaded not guilty and sought by motion suppression of certain evidence obtained by search warrant at his residence, which motion was overruled.

Trial commenced on March 9, 1986 and Petitioner was convicted of all counts of the indictment. For the two felony one counts of Aggravated Trafficking he was sentenced to two concurrent terms of 4 to 25 years incarceration, each term including a term of actual incarceration of five years. Consecutive to those terms was one year term (with an eighteen month term of actual incarceration) on the felony three count of Aggravated Trafficking. Petitioner was given a six month sentence on the Permitting Drug Abuse charge.

Notice of Appeal was timely filed and the Court of Appeals for Montgomery County affirmed his conviction. The Ohio Supreme Court declined review and Petitioner now seeks review in the United States Supreme Court.

STATEMENT OF THE FACTS

In investigating a complaint of an illegal gambling machine at the Cabaret Lounge in Harrison Township, plainclothes detectives from the Montgomery County Sheriff's Office met Kitty Bailey, a barmaid at the lounge, who indicated that she was willing to obtain cocaine for them (Trial Transcript, hereinafter "Tr.", 51, 52, 159, 352, 353). She claimed she had two sources and so on July 29, 1986 she obtained a gram of cocaine for Det. Douglas Hoover from an Anthony Marinelli (Tr. 52, 353). On August 1, 1986, Bailey set up another sale between Marinelli and the police. They purchased one half of an ounce of cocaine from him for $1,100.

The detectives shortly thereafter told Bailey that they wanted to buy one and one half ounces of cocaine but they didn't like the way Anthony Marinelli did business (Tr. 57, 165). She called the Petitioner, Clayton Stapleton, with whom she resided, from the Cabaret Lounge. After the call, she told the detectives that she could get them one and one half ounces of cocaine from Petitioner for $2,950.00 (Tr. 57, 165, 356). Shortly after Bailey had called Petitioner and set up the deal, Petitioner himself came into the Cabaret Lounge (Tr. 57, 357). Bailey explained that the Petitioner was just

checking out the people with whom he was doing business (Tr. 357).

That sale took place on August 5, 1986 (Tr. 59). She brought the ounce and a half in half ounce increments and the police field tested it and paid her. Bailey testified that she had obtained the ounce and a half of cocaine from Petitioner, at his house (Tr. 169).

After that sale, the detectives told Bailey that they were interested in buying four to six ounces, and asked if they could get a better price for that quantity (Tr. 171, 360). Petitioner told Bailey he had only four ounces left, but he would sell it to her for $1,700 an ounce (Tr. 172). She contacted Hoover, and the deal was set up for August 8. The parties were to meet at the Holiday Inn on Wagoner Ford Road (Tr. 173).

According to Bailey, when she went to Petitioner's house to get the cocaine from him on August 8, he was fishing in his pond with a woman named Brenda Day (Tr. 174). Petitioner asked Bailey if she wanted him to accompany her and she told him that she'd feel safer if he did come along (Tr. 174-175). He took the bag containing the cocaine from his hat and handed it to her (Tr. 175). She took her wallet out of her purse to make room for the cocaine, and stashed it under the seat in Petitioner's truck (Tr. 194). Petitioner then drove her to the Holiday Inn but did not go in (Tr. 173).

Brenda Day testified that on the afternoon of August 8, she was at the Petitioner's house fishing with him in his pond when he answered a telephone call on his cordless phone from a mutual friend, Dave Thomas (Tr. 299). In the course of the conversation Brenda heard Petitioner say that he had wanted Thomas to accompany Kitty to North Dixie Drive to take care of some business and he would have paid him $100.00 (Tr. 300). After that call, Petitioner told her that he had to go up on North Dixie with Kitty, and that she should just remain where she was unless something went wrong (Tr. 301). After Bailey arrived, Day saw Petitioner get into the safe in his garage and take out something that she could not identify and

put it in his hat. Petitioner then left with Bailey (Tr. 301, 305).

Det. Joseph Steuer had set up surveillance of Petitioner's residence at about 4:45 p.m. (Tr. 371). From his vantage he saw Petitioner leave in his pickup truck at about 5:30 p.m. (Tr. 372). He could not see if there was a passenger in the truck (Tr. 372).

Det. Orihood set up surveillance at the Holiday Inn (Tr. 397). He testified that Petitioner arrived there at about 5:45 p.m., dropped off a white female and then parked and got out and sat in the grass (Tr. 390, 405).

After Petitioner dropped Kitty Bailey off she met Dets. Hoover and Ware at the bar in the motel but they all soon left to make the sale at a different motel (Tr. 173). Upon their arrival there Det. Munson was waiting (Tr. 173). She removed the cocaine from her purse and gave it to Hoover who weighed and tested it (Tr. 174). He then paid her the agreed upon price (Tr. 174). Shortly thereafter the detectives identified themselves and arrested Bailey (Tr. 67, 364).

After Bailey's arrest, Det. Orihood was directed to arrest the Petitioner, who was still waiting outside of the Holiday Inn (Tr. 400). Bailey's wallet was found under the seat of Petioner's truck (Tr. 401). A search warrant was executed at Petitioner's residence and 27.13 grams of cocaine were found inside a vase in his dining room (Tr. 373, 376, 33-34).

In exchange for her testimony against Petitioner, Bailey was permitted to plead to reduced charges. Her indictment was for four counts of Aggravated Trafficking, including two which carried terms of actual incarceration of five years each, and one which carried a term of actual incarceration of three years. She pled guilty to three counts of Aggravated Trafficking, two of which carried sentences of actual incarceration of eighteen months (Ex. A, Tr. 188).

Petitioner testified in his own behalf that he was not involved in any way in drugs (Tr. 458). He testified that Bailey

had been living with him ever since he'd hired her to clean his house in early July (Tr. 468). He said that he had no idea that there was cocaine in his vase, and did not know Bailey was delivering cocaine to the Holiday Inn (Tr. 472). When Dave Thomas couldn't accompany her there he agreed to take her just to get rid of her because he had another date, Brenda Day, at his house waiting for him (Tr. 474).

The defense also introduced into evidence a letter written by Kitty Bailey a few days after her arrest (Tr. 199-201). The letter exonerated Petitioner and named Anthony Marinelli as the source of the cocaine sold on August 5 and August 8 (Tr. 199-201). Bailey testified that some weeks after she wrote it she showed the letter to her ex-husband in Belmonte Park, then tore it up and threw it away (Tr. 185, 288-289). The Petitioner introduced evidence that a park worker found the letter, showed it to a friend who knew Petitioner, and that friend gave it to Petitioner (Tr. 430, 439, 446, 449). Bailey explained that she was distraught when she wrote the letter, and saw it as a means to get back at Marinelli who had beaten her on New Year's Eve, and who regularly beat her sister (Tr. 206).

ARGUMENT

Petitioner argues that he had a due process right to have the jury given a cautionary instruction on the credibility of accomplice testimony, and that the trial court's refusal to so instruct the jury was a constitutional violation. This Court has never so held, and it is Respondent's position that the failure of the trial court to give the requested instruction was not a denial of due process.

At the time Petitioner was convicted he had a statutory right under the law of Ohio not to be convicted on the uncorroborated testimony of an accomplice. Ohio Rev. Code § 2923.03(D). That statute was amended as of September 16, 1986. From that date on, a person could be convicted on the basis of the uncorroborated testimony of an accomplice. However, if an accomplice testified against an accused, the accused was entitled to an instruction, set out in the statute:

> "The testimony of an accomplice does not become inadmissible because of his complicity, moral turpitude, or self-interest, but the admitted or claimed complicity of a witness may affect his credibility and make his testimony subject to grave suspicion, and require that it be weighed with great caution.
>
> It is for you, as jurors, in the light of all the facts presented to you from the witness stand, to evaluate such testimony and to determine its quality and worth or its lack of quality and worth."

The crimes in this case were committed on August 5 and August 8, 1986, prior to the effective date of the new Ohio Rev. Code § 2923.03(D). The trial commenced March 9, 1987, after the new Ohio Rev. Code § 2923.03(D) went into effect.

There is no dispute that Petitioner was entitled to the protection of the former Ohio Rev. Code § 2923.03(D). That is, Petitioner was entitled to not be convicted on the uncorroborated testimony of an accomplice. While Defendant is

entitled to the greater protection of the former R.C. 2923.03(D) due to the date the crime was committed, he is not entitled under the law of Ohio to the cautionary jury instruction set out in R.C. 2923.03(D), as amended. The amended statute is prospective only, and may not be applied to a defendant charged with committing an offense prior to that date. *State* v. *Mullins*, 34 Ohio App. 3d, 192 (1986). Prior to the enactment of the mandatory cautionary instruction provided by revised Ohio Rev. Code § 2923.03(D), a cautionary instruction such as requested by Defendant was held to be improper as constituting an improper comment upon the evidence. *State* v. *Flonnory*, 31 Ohio St. 2d 124, 285 N.E. 2d 726 (1972).

Petitioner's position is that he is entitled not only to the earlier and greater protection of not being convicted on the uncorroborated testimony of an accomplice, he is also entitled to a cautionary instruction on accomplice testimony, and the denial of that instruction is a due process violation. None of the cases cited by Petitioner support that conclusion. The cases cited by Petitioner discuss whether the failure to give a cautionary instruction is an error, or is plain error, but do not find that the failure to so instruct on facts similar to those herein is a due process violation. *State* v. *Beasley*, 519 F. 2d 233 (5th Cir. 1975) is representative. The Court in *Beasley* cited earlier cases for the propositions that the instruction, if requested, should be given but failure to give the instruction was not plain error. The Court found that Defendant's substantial rights were not prejudiced by the failure to instruct on accomplice testimony, even where the accomplice testimony was uncorroborated and the Court had included in the charge a "presumption of truthfulness of witnesses" instruction.[1]

[1] This instruction provided:

> We start out with the presumption that every witness speaks the truth. However, this presumption may be overcome in several ways, such as the manner in which the witness testified, by the character of his testimony, by the contradictory evidence, or by his motives.

In *United States* v. *Scelzo*, 810 F. 2d 2, (1st Cir. 1987) the court held that it was not necessarily reversible error to refuse to give a requested cautionary instruction. That Court noted that while "it is prudent for the court to give a cautionary instruction, even when one is not requested, failure to do so is not automatic error especially where the testimony is not incredible or otherwise insubstantial on its fact." In *Scelzo*, the testimony of the accomplice was corroborated, the Defendant's attorney brought out on cross-examination the accomplices' personal interest in testifying against the Defendant, and the court instructed the jury to consider every witnesses' interest or lack of interest in the case. In view of those circumstances, the Court of Appeals concluded that it was not error to refuse to give the requested instruction.

The case at bar is similar to *Scelzo*. In this case, the evidence of petitioner's guilt was corroborated by the observations of the police officers, the testimony of Brenda Day, Petitioner's arrest at the scene of the sale, and the subsequent discovery of cocaine at his residence. Additionally, the terms of the plea bargain the accomplice made were in evidence and counsel for Petitioner in cross-examination did a thorough job of demonstrating that Kitty Bailey stood to benefit by cooperating with the police. The testimony was crystal clear that Kitty Bailey had a motive to see Petitioner convicted. The factors affecting the believability of her story were clearly set out for the jury. Additionally, defense counsel in argument articulated the reasons that her testimony as an accomplice should be evaluated with caution. Finally, the court instructed the jury on the evaluating credibility of witnesses in general (Tr. 556-557).

In this situation, it cannot be said that the failure to give the requested cautionary instruction was a denial of due process. The exclusion of the instruction did not cause Petitioner's trial to be fundamentally unfair. The purpose of an accomplice instruction is to assure that the jury realizes that an admitted accomplice's testimony may be affected by the hope of a favor or conversely, by the fear of reprisal from the government, and considers this factor in weighing such

person's testimony. *United States* v. *Beasley*, 519 F. 2d 233 (5th Cir. 1975). That purpose was accomplished in this case by other means.

CONCLUSION

For the reasons discussed herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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by: CARLEY J. INGRAM
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APPELLATE DIVISION

APPENDIX "A"

§ 2923.03 Complicity.

(D) No person shall be convicted of complicity under this section solely upon the testimony of an accomplice, unsupported by other evidence.

APPENDIX "B"

§ 2923.03 Complicity.

(D) If an alleged accomplice of the defendant testifies against the defendant in a case in which the defendant is charged with complicity in the commission of or an attempt to commit an offense, an attempt to commit an offense, or an offense, the court, when it charges the jury, shall state substantially the following:

"The testimony of an accomplice does not become inadmissible because of his complicity, moral turpitude, or self-interest, but the admitted or claimed complicity of a witness may affect his credibility and make his testimony subject to grave suspicion, and require that it be weighed with great caution.

It is for you, as jurors, in the light of all the facts presented to you from the witness stand, to evaluate such testimony and to determine its quality and worth or its lack of quality and worth."